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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 297

E. MICHAEL McCANN, et al.,

Appellant,

v.

SIDNEY G. BABBITZ, M.D.,

Appellee.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

MOTION TO AFFIRM

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IN THE

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OCTOBER TERM, 1970

E. MICHAEL McCANN, et al.,

Appellant,

v.

SIDNEY G. BABBITZ, M.D.,

Appellee.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

MOTION TO AFFIRM

Appellee, pursuant to Rule 16, moves that the final judgment and decree be amended, and as amended, affirmed on the ground that the questions presented are so unsubstantial as not to warrant further argument.

CITATION TO OPINIONS BELOW

The decisions below of the United States District Court for the Eastern District of Wisconsin are reported as *Babbitz v. McCann* (E.D. Wis., 1969), 306 F.Supp. 400, and *Babbitz v. McCann* (E.D. Wis., 1970), 310 F.Supp. 293.

JURISDICTION

Appellant's Jurisdictional Statement adequately sets forth the jurisdictional basis for this appeal, i.e., Title 28 U.S.C. § 2101(b) and Title 28 U.S.C. § 1253.

STATUTE INVOLVED

II Wisconsin Statutes, 1967, Chapter 940.04, pp. 4228, 4229, which provides as follows:

"(1) Any person other than the mother, who intentionally destroys the life of an unborn child may be fined not more than $5,000 or imprisoned not more than 3 years or both.

"(2) Any person, other than the mother, who does either of the following may be imprisoned not more than 15 years:

"(a) Intentionally destroys the life of an unborn quick child; or

"(b) Causes the death of the mother by an act done with intent to destroy the life of an unborn child. It is unnecessary to prove that the fetus was alive when the act so causing the mother's death was committed.

"(3) Any pregnant woman who intentionally destroys the life of her unborn child or who consents to such destruction by another may be fined not more than $200 or imprisoned not more than 6 months or both.

"(4) Any pregnant woman who intentionally destroys the life of her unborn quick child or who consents to such destruction by another may be imprisoned not more than 2 years.

"(5) This section does not apply to a therapeutic abortion which:

"(a) Is performed by a physician; and

"(b) Is necessary; or is advised by 2 other physicians as necessary, to save the life of the mother; and

"(c) Unless an emergency prevents, is performed in a licensed maternity hospital.

"(6) In this section 'unborn child' means a human being from the time of conception until it is born alive."

QUESTIONS PRESENTED

1. Does the above-quoted statute of the State of Wisconsin contravene the Ninth Amendment or any other provision of the United States Constitution?

2. Does the above-quoted statute of the State of Wisconsin deprive physicians and their patients of rights protected by the United States Constitution and is said statute a valid exercise of state police power as supported by any compelling governmental interest?

3. Should the lower court have permanently enjoined the pending State prosecution of Appellant?

4. Should this Court declare the entire Wisconsin abortion statute unconstitutional and invalid?

STATEMENT OF THE CASE

Appellee, Sidney G. Babbitz, a licensed and practicing physician in the city and county of Milwaukee, State of Wisconsin, was charged by a warrant issued by Appellant, District Attorney of Milwaukee County, with a violation of Section 940.04(1) and (5) of the Wisconsin statutes. Upon so being charged, Appellee moved the United States District Court for the Eastern District of Wisconsin for the convening of a three-judge court pursuant to Title 28 U.S.C., Sections 2281 and 2284 to consider certain infirmities of the above-cited Wisconsin statute under the United States

Constitution, and for a declaratory judgment that the statute involved was unconstitutional. An Order was signed December 2, 1969, by the United States District Court denying Appellee's request for temporary injunctive relief, but granting Appellee's request that a three-judge district court be convened.[1] The three-judge court granted a full hearing to the parties on January 23, 1970, and on March 5, 1970 filed its *per curiam* opinion and judgment, declaring the afore-cited Wisconsin statute violative of the United States Constitution in certain respects.[2] The Court also denied the equitable relief sought by Appellee but stated:

> "In the event that the state persists in the prosecution of Dr. Babbitz, we have no reason to doubt that the state courts of Wisconsin will fully vindicate his federal constitutional rights. *See Zwicker v. Ball*, 270 F.Supp. 131 (W.D. Wis. 1967), aff'd 391 U.S. 353 (1968); *Soglin v. Kauffman*, 286 F.Supp. 851 (W.D. Wis. 1968)."[3]

Subsequent to the date upon which the above referred opinion and judgment was filed, to wit, March 5, 1970, Appellee, on April 6, 1970, filed and there was heard a Motion to Dismiss the Information in the Circuit Court, Milwaukee County, State of Wisconsin (Branch 11, Judge Herbert J. Steffes), in the case of *State of Wisconsin v. Sidney Babbitz*, H-371. At that time Appellee contended that the above-quoted language of the three-judge District Court and its declaratory judgment entitled him to a dismissal of the state charges against him, and further, that the declaratory judgment of the three-judge District Court entitled Appellee to an order granting his Motion to Dismiss the Information. The trial court declined to issue such an

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[1] *Babbitz v. McCann*, 306 F.Supp. 400 (E.D. Wis., 1969).

[2] *Babbitz v. McCann*, 310 F.Supp. 293 (E.D. Wis., 1970).

[3] *Id.*, page 297.

order (Appendix "A"), denied the Motion to Dismiss the Information and set the date for arraignment of Appellee on May 25, 1970, and trial for November 30, 1970. Subsequent to the date upon which the above referred Motion to Dismiss the Information was denied, to wit, June 5, 1970, the State of Wisconsin Supreme Court, *per curiam*, declined to comply with the prayer of Appellee for leave to commence an original action in that Court, without prejudice to reapply when the facts warrant. The petition for leave to file an original action in the nature of *habeas corpus* was prompted by the refusal of the trial court, as noted, to dismiss the Information after the state statute had been held unconstitutional by the three-judge District Court, and by that Court's admonition that it had no "doubt that the state courts of Wisconsin will fully vindicate his [Appellee's] federal constitutional rights . . ."[4] The *Per Curiam* Order of the Wisconsin Supreme Court is set forth herein as Appendix "B." Additionally, Appellee instituted a new action in the United States District Court for the Eastern District of Wisconsin for the convening or re-convening of a three-judge federal court and for injunctive relief after his Motion to Dismiss the Information was denied.[5] Judge Gordon dismissed Appellee's action[6] from which dismissal Appellee has appealed. It is thus established that Appellee sought every legal means available to him in the state courts of Wisconsin to secure full vindication of his federal constitutional rights, as suggested by the three-judge District Court, to no avail. Prior to the ruling of the Wisconsin Supreme Court of June 5, 1970, Appellee was forced to plead and pleaded "not guilty" to the charges brought by Appellant on May 25, 1970, in the

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[4] *Id.*

[5] See Appendix "A."

[6] A copy of Judge Gordon's opinion is reprinted as Appendix "C".

Circuit Court, Milwaukee County, with a trial date set for November 30, 1970.

The effect of the last two state court rulings is that Appellee is scheduled to be tried on a charge of an alleged violation of a statute expressly held unconstitutional by the three-judge District Court and "full vindication of his federal constitutional rights" by the state courts of Wisconsin in which the three-judge District Court had expressed such confidence clearly has proven so far to be illusory and unavailing to Appellee.

THE QUESTIONS PRESENTED ARE NOT SUBSTANTIAL

Appellee, pursuant to Rule 16, in the above-entitled case has moved to amend, and as amended, to affirm the final opinion and judgment of the three-judge District Court on the ground that the questions presented are so unsubstantial as not to warrant further argument.

INTRODUCTION

There is pending before this Court *United States of America v. Vuitch*, No. 84, October Term, 1970, in which a Jurisdictional Statement, a Motion to Affirm and briefs have been filed, and as to which an Order of this Court has been issued,[7] directing that jurisdictional issues be postponed to the hearing of the case on the merits in the October Term, 1970. To the extent the presentation in Appellee's Motion to Affirm and the Appellee's Brief filed in *United States of America v. Vuitch, supra*, are relevant to the issues in this case, Appellee herein adopts the *Vuitch* Appellee's presentation in its Motion to Affirm and its Brief as though fully set forth and argued in the instant

[7] 397 U.S. 1061.

Motion to Affirm. The issues involved in this appeal are similar to those raised in *Vuitch, supra.*

I.

CHAPTER 940.04 OF THE STATUTES OF THE STATE OF WISCONSIN, 1967, CONTRAVENES THE NINTH AMENDMENT AND OTHER PROVISIONS OF THE UNITED STATES CONSTITUTION.

Appellee first asserts that the decision of the District Court as far as it goes is plainly correct; namely, that the Wisconsin statute unconstitutionally deprives married couples and single women of the right to choose whether to have children, a right effectively secured by the Ninth Amendment. Appellant seeks to challenge the standing of Appellee to "assert the constitutional rights of expectant mothers so as to obtain a federal declaratory judgment that the statute under which he is being prosecuted is unconstitutional."[8] This challenge must fail. The doctor has ample standing "to assert his patient's constitutional rights as well as his own."[9] "Standing" was specifically approved, as to Appellee, by Judge Reynolds in *Babbitz v. McCann,* 306 F.Supp. at p. 401, when the District Court considered the question of convening a three-judge District Court under Title 28 U.S.C. § 2281. The substantive contentions of Appellee as reflected in the District Court's subsequent decision on the merits make it clear that there exists the "nexus" between the status asserted by Appellee and the claim he presented to the District Court, thus satisfying this

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[8] Jurisdictional Statement, pp. 4, 19-21.

[9] *Griswold v. Connecticut,* 381 U.S. 479 (1965) clearly gives Appellee the "standing" to raise the rights of his patient, as well as rights of his own. Moreover, "[I]n ruling on standing, it is both appropriate and necessary to look to the substantive issues * * * to determine whether there is a logical nexus between the status asserted and claim to be adjudicated. *Flast v. Cohen,* 392 U.S. 83, 102 (1968).

Court's legal prerequisite to "standing". Moreover, the arguments of Appellant notwithstanding as to the effect it claims for *Tileston v. Ullman*, 318 U.S. 44 (1943), and *Alderman v. United States*, 394 U.S. 165 (1969), Appellant's arguments have been expressly met and overruled in *California v. Belous*,[10] *United States v. Vuitch*,[11] and *Roe* and *Hallford v. Wade*.[12]

A number of lower courts including *Vuitch, supra, Roe* and *Hallford, supra*, and the California Supreme Court in *Belous, supra*, have held that various state abortion statutes such as the one in question here are unconstitutional. Disregarding Appellant's personal attack on the contending parties in those cases, the questions raised, particularly by physicians, are based fundamentally on the interest sought to be protected in the *right of choice of events which by their nature and consequence, bear in a fundamental manner on the privacy of individuals.* The manner by which such interests are secured by the Ninth Amendment is classically illustrated by the concurring opinion of Mr. Justice Goldberg in *Griswold, supra* (at p. 492):

> "The Ninth Amendment demonstrates the belief of the Constitution's authors that *fundamental* rights exist that are not expressly enumerated in the first eight Amendments and intend that the list of rights included therein be deemed exhaustive." * * * "The Ninth Amendment simply shows the intent of the Constitution's authors that other fundamental personal rights should not be denied such protection or disparaged in any other way simply because they

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[10] 80 Cal. Rep. 354 (1969), *cert. den.*, 397 U.S. 915 (1970).

[11] 305 F.Supp. 1032 (D.D.C. 1969), #84, October Term, 1970, U.S. Supreme Court.

[12] ___ F.Supp. ___ (Civ. Nos. 3-3690-B and 3-3691-C, N.D. Tex., June 17, 1970). For further references and argument concerning Appellee's "standing," the Court is respectfully referred to Point IV, *infra*.

are not specifically listed in the first eight Constitutional amendments."

Further quoting from that Opinion:

> "In determining which rights are fundamental, judges are not left at large to decide cases in light of their personal and private notions. Rather they must look to the 'traditions and [collective] conscience of all people' to determine whether a principle is 'so rooted [there] . . . as to be ranked as fundamental.' *Snyder v. Massachusetts*, 291 U.S. 97, 105. The inquiry is whether a right involved 'is of such a character' that it cannot be denied without violating those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions . . .' *Powell v. Alabama*, 287 U.S. 45, 1967."

Freedom to choose in the matter of abortions has been accorded the status of a "fundamental right" in every case which has come to the attention of Appellee where the question has been raised.[13] Paraphrasing former Associate Justice Tom C. Clark in a recent law review article,[14] the result of all these decisions is the evolution of the concept that there has always existed and still exists a certain zone of individual privacy protected by the Constitution. Unless the state has a compelling, subordinating interest that outweighs the individual liberties of American citizens, it may not constitutionally interfere with a person's marriage; sex life, home, children and day-to-day living. "This is one of

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[13]The instant case; *Hallford, Belous, State v. Munson* (South Dakota Circuit Court, Pennington County, April 6, 1970); *Vuitch; People v. Robb* (Municipal Court, Central Orange County Judicial District, California); *State v. Gwynne*, (Municipal Court, Central Orange County Judicial District, June 16, 1970); *Doe v. Scott*, No. 70-C-395 (N.D. Ill., filed Feb. 20, 1970).

[14]*"Religion, Morality and Abortion: A Constitutional Appraisal,"* 2 Loyola Univ. L. Rev. 1, 8 (1969).

the most fundamental concepts that the founding fathers had in mind when they drafted the Constitution. . . . Abortion falls within that sensitive area of privacy—the marital relation. One of the basic values of this privacy is birth control, as evidenced by the *Griswold* decision. Griswold's act was to prevent formation of the fetus. This, the Court found, was constitutionally protected. If an individual may prevent conception, why can he not nullify that conception when prevention fails?"[15]

II.

CHAPTER 940.04 OF THE STATUTES OF THE STATE OF WISCONSIN, 1967, DEPRIVES PHYSICIANS AND THEIR PATIENTS OF RIGHTS PROTECTED BY THE UNITED STATES CONSTITUTION AND IS NOT A VALID EXERCISE OF THE STATE POLICE POWER AS IT IS NOT SUPPORTED BY ANY COMPELLING GOVERNMENTAL INTEREST.

Appellee has challenged the substantive validity of the state statute under the First, Fifth and other amendments to the United States Constitution. This Court may hold, as did the District Court below, that the statute is not vague nor uncertain and that it bears one or another construction which will sustain it.

This Court has already embraced the practice of making definitive rulings in a wide variety of cases, particularly where the concept of freedom of association[16] was at issue, as it is here. "It would furnish a definitive ruling on a point of Federal law for . . . future guidance . . . of the parties."[17] A similar "definitive ruling" on the federal questions raised hereafter would avoid costs, multiplicity

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[15] *Id.*, at p. 9.

[16] *NAACP v. Button*, 371 U.S. 415 (1963).

[17] *LSCRRC v. Wadmond*, 299 F.Supp. 117, 123 (S.D.N.Y. 1969).

of suits and delay, prevent continued litigation on the substantive issues and can serve justice, and preserve time and resources.

Although the court below correctly premised its decision on the right of privacy recognized to be constitutionally supportable under the Ninth Amendment, the present action has First Amendment implications, namely, the right of the physician to provide medical information, followed by treatment for his patient, and the right of the patient to receive same. The right of a competent licensed physician to give medical advice can be characterized as free expression alone,[18] or when viewed as an aspect of the physician-patient relationship, it becomes part of the freedom of association between physician and patient. The First Amendment has long been held to accord presumptive protection for the "freedom to associate and privacy in one's associations." *NAACP v. Alabama*, 357 U.S. 449,

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[18] Similarly, it is an aspect of the physician's general liberty under the Fifth Amendment to practice his chosen profession free from unconstitutional restraint. See *Willner v. Committee on Character and Fitness*, 373 U.S. 96, 102-03 (1963); *Slochower v. Board of Higher Educ.*, 350 U.S. 551 (1956); *Birnbaum v. Trussell*, 371 F.2d 672 (2d Cir., 1966); see also *United States v. Freund*, 290 Fed. 411 (D. Mont. 1923), invalidating a prohibition act which restricted the amount of alcohol a physician could prescribe:

> "It is an extravagant and unreasonable attempt to subordinate the judgment of the attending physician to that of Congress, in respect to matters with which the former alone is competent to deal, and infringes upon the duty of the physician to prescribe in accord with his honest judgment, and upon the right of the patient to receive the benefit of the judgment of the physician of his choice."

With respect to the prescription of contraceptives, moreover, physicians received considerable protection in many early cases to the point that the various Comstock acts took the path of desuetude. See, e.g., *United States v. Nicholas*, 97 F.2d 510 (2d Cir. 1938) (L. Hand, J.); *United States v. One Package*, 86 F.2d 737 (2d Cir., 1936) (A. Hand, J.); *Youngs Rubber Corp. v. C. I. Lee & Co.*, 45 F.2d 103 (2d Cir., 1930) (Swan, J.).

462 (1958). This has been the case with the marital relationship,[19] and that of attorney and client.[20] The relationship between physician and patient is no different; it promotes the fundamental purpose of maintaining the health and well-being of the American people.

The advice aspect of medical practice is but one part of Appellee's claim, for medical treatment involving interruption of the unwanted pregnancy may be what the patient ultimately requests, and the criminal statute proscribes.

> "[W]hen 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest . . . must appear . . . ." *United States v. O'Brien*, 391 U.S. 367, 376 (1968).

The nature of this interest has been described by a "variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong."[21]

Before discussing the possible State interests which have been offered to compel a woman to bear and raise children against her will, Appellee will examine various other rights of constitutional dimension which the challenged statute curtails.

The antecedents and progeny of *Griswold v. Connecticut*, 381 U.S. 479 (1965), offer generalized support for applying a presumptive constitutional right of privacy to encompass

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[19] See *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965), describing the "marriage relationship" as

> "an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions."

[20] See *NAACP v. Button*, 371 U.S. 415 (1963); *Brotherhood of Railway Trainmen v. Virginia*, 377 U.S. 1 (1964); *United Mine Workers v. Illinois State Bar*, 389 U.S. 217 (1967).

[21] 391 U.S. at 376-77 (citations omitted).

the right of a woman to have an abortion, in the early stages of pregnancy, when contraception failed or was not used.

Griswold is not an isolated decision confined to its facts, but is one in a continuing line of cases involving various aspects of personal privacy and family autonomy.[22] Most recently this Court recognized a "fundamental . . . right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy." *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (Marshall, J.). Indeed, the *Stanley* case is of special importance, for there a majority of the Court embraced with approval the very significant language from Mr. Justice Brandeis' dissent in *Olmstead v. United States*:

> "The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized man." 277 U.S. at 478.

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[22] Commentary on the *Griswold* case has been extensive. Particularly noteworthy materials include: Kelly, *Clio and the Court: An Illicit Love Affair* (1965) Sup. Ct. Rev. 119; Gross, *The Concept of Privacy*, 42 N.Y.U.L. Rev. 34 (1967); Pilpel, *Birth Control and a New Birth of Freedom*, 27 Ohio St. L. J. 679 (1966); Beaney, *The Griswold Case and the Expanding Right to Privacy*, 1966 Wis. L. Rev. 979; *Symposium—Comments on the Griswold Case*, 64 Mich. L. Rev. 197 (1965); Note, *The Uncertain Renaissance of the Ninth Amendment*, 33 U. Chi. L. Rev. 814 (1966); Note, *The Supreme Court—1964 Term*, 79 Harv. L. Rev. 56, 162-65 (1965).

This dissent was also quoted with approval by Burger, Circuit Judge, in *Application of the President and Directors of Georgetown College, Inc.*, 331 F.2d 1010, 1016-17 (D.C. Cir.) (*en banc*) (dissenting opinion); *cert. den.*, 377 U.S. 978 (1964).

The Wisconsin abortion law, if strictly construed, gives little consideration to a woman's feeling, pains, thoughts, and emotions. It impinges severely upon her dignity, her life plan, and her marital relationship if she has one. It is a first order invasion of her privacy with irreparable consequences.

The protection of various rights in the marital and family context has firm origins in decisions dated back over fifty years.

A first and recent example, *Loving* v. *Commonwealth*, 388 U.S. 1, 12 (1967) (alternate ground of decision), specifically held that the due process clause of the Fourteenth Amendment protects "[t]he freedom to marry. . . as one of the vital personal rights essential to the orderly pursuit of happiness by free men." *Loving* stands for the proposition that "the right to marry" is protected by the due process clause although not specifically mentioned in the Bill of Rights. The decision must lend further support to arguments that other important interests associated with marriage and the family are protected from arbitrary government intrusion.

Throughout the argument of Appellant herein there runs a thread which, while obscured at times, nevertheless is clearly designed to persuade this Court that the fetus is a live person. If the fetus is considered to be alive from the point of conception, it could reasonably be argued that the fetus would be deprived of due process of law under the Fourteenth Amendment by a judicial interpretation which would "permit its life to be taken." In each case which has come to the attention of the Appellee where the civil rights of the fetus are involved, the courts have relied upon the requirement of a subsequent live birth, or have relied

upon the rights represented by the interests of the parents. The treatment accorded persons convicted of murder, of course, is always different from that accorded a doctor who has performed an abortion. Many scientists have argued the question of whether life begins at conception or at birth. *Black's Medical Dictionary* states "the property of 'life' is present from the very beginning."[23]

Moving from this definition through the law, it is clear that in every area in which the courts have been confronted by the question as to whether or not fetal life is subject to legal rights, the answer has been in the affirmative.[24] So

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[23] 27 Ed., Barnes and Noble, Inc., New York, N.Y., 1967, at page 367.

[24] *Rights:* The following is a summary of the rights which have been granted to the fetus by the courts as summarized from 3 S.L.R. 225, *"Abortion, the Law and Defective Children: A Legal-Medical Study,"* Suffolk University Law Review (Vol. III: Spring, 1969, pp. 225-276).

A. Right of Support

(1) In *Metzger v. People* (1936), 98 Col. 133, 53 P.2d 1189, the Supreme Court of Colorado affirmed order that defendant "pay 30% of his salary to the support of his unborn child." (at p. 259).

(2) In *California v. Sianes* (1933), 134 Cal. App. 355, 25 P.2d 487, "the defendant was charged with 'failure to support' his minor child, to wit, a child conceived but not yet born'" (at p. 259).

B. Right To Sue

(1) In *Kyne v. Kyne* (1940), 38 Cal. App. 2d 122, 100 P.2d 806, the proceeding was instituted for an unborn minor by his guardian in order that the defendant be declared father of fetus and to compel support. The court found that "the unborn plaintiff had the right to bring his bill for determination of paternity and to compel support." (at p. 260).

C. Right To Have a Guardian Appointed

(1) In *Raleigh Fitlan-Paul Morgan Memorial Hospital v. Anderson* (1964), 42 N.Y. 421, 201 A.2d 537, *cert. den.*, 377

it is clear that the authorities regard the fetus as a person within the meaning of the state and Federal constitutions

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U.S. 985 (1964), the Supreme Court of New Jersey appointed a guardian for a fetus "who was in the womb of a woman who would not accept blood transfusions for religious reasons." (at p. 260).

(2) In *Hoener v. Bertinato*, 67 N.Y. Super. 517, 171 A.2d 140 (1961), a county welfare department "was awarded custody of a fetus who would need blood transfusions shortly after birth." (at p. 260). "The court held that a fetus is a 'minor child' within the meaning of the statute which permits the court to take a child from the custody of its parents when they fail to provide for it." (at p. 267).

D. Right To Take by Will or Descent

(1) In *In Re Well's Will* (1927), 129 Miss. 447, 221 N.Y.S. 417, a testatrix had provided that part of her estate be used to create a trust fund to be divided among her grandchildren at the time of her death. The testatrix died on May 22, 1922. A grandchild, Elizabeth Davis, was born after the death of the testatrix and the court calculated the child had been conceived on May 1, 1922. The court ruled "since she was alive in her mother's womb, twenty-one days after conception, when her grandmother died, Elizabeth 'was and is a living child for all purposes pertaining to her property rights.'" (at p. 261).

E. Rights Under Workmen's Compensation Acts

(1) In *Morgan v. Susino Construction Co.*, 130 N.Y.S. 418, 33 A.2d 607 (1943), a child born after his father's death was held to be "a child *in esse* at the time of his father's passing." (at p. 261).

F. Right To Recover for Pre-natal Injuries

(1) In 1946 a Federal District Court in *Bombrest v. Katz* (1946), 65 F.Supp. 138, allowed a suit for pre-natal injury basing its opinion on the individuality of the viable fetus. Previously, courts had ruled (as did Mr. Justice Holmes in *Dietrich v. Northampton* (1884), 138 Mass. 14), that an action for pre-natal injuries could not be maintained because "a fetus was simply a part of the mother and not a separate human being." (at p. 261).

since the law has recognized the civil rights of the fetus in every area of litigation in which the question has arisen. However, *in all of the instances cited, there has been a judicial reliance on the requirement of a live birth, or some reflection of the interest of the parents.* The *Belous* case *supra*, at p. 363, reflects this research as follows:

> "Cases holding that a child can recover for injuries caused before his birth require that a child be

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(2) The recognition of a fetus as an existing person came in 1953 in *Kelly v. Gregory* (1953), 282 App. Div. 542, 125 N.Y.S.2d 696. In this case the plaintiff "alleged that he had been injured in the third month of his mother's pregnancy. The court held that the fact of plaintiff's nonviability at the time of injury did not mean that he was not a separate human being." (at p. 263).

(3) In *Mallison v. Pommeroy* (1955), 205 Ore. 690, 291 P.2d 225, the Supreme Court of Oregon ruled "that the state had recognized 'the separate entity of an unborn child by protecting him in his property rights and against criminal conduct . . .' and concludes that an unborn child is a person within the meaning of the state constitution."

G. Wrongful Death of Fetus

(1) In 1949 the Minnesota Supreme Court in *Verkennes v. Cornelia*, 229 Minn. 365, 38 N.W.2d 839, allowed recovery for the wrongful death of an unborn viable child (at p. 264).

(2) In *Porter v. Lassiter* (1955), 91 Georgia App. 712, 87 S.E.2d 100, a woman was injured when she was about one month and a half pregnant. The trauma resulted in a spontaneous abortion three months later. "The Georgia Court noted that the killing of a fetus after quickening is murder under the Georgia abortion law and ruled that plaintiff had stated a case on which relief could be given." (at p. 264).

(3) In 1960 in *Keyes v. Construction Sewer, Inc.* (1960), 340 Mass. 633, 165 N.E.2d 912, Massachusetts allowed recovery for the wrongful death of a viable child.

(4) In 1967 the wrongful death of a nonviable child was allowed in *Torigian v. Watertown News Co.* (1967), 352 Mass. 446, 225 N.E.2d 926 (at p. 264).

> alive. The interest protected is that of the child, and the legal right attaches not to the embryo or fetus but to the living child. Where the embryo or fetus is allowed to assert rights before birth, *it is the prospective mother or parents who are bringing the action; thus it is their interest that the law supports.* Similarly, in those jurisdictions which recognize a cause of action for the loss of an unborn child, it is the parents 'distressing-wrong in the loss of a child' that the law has recognized."

At common law, certain types of abortion, those before quickening, were not considered a crime at all. A fetus aborted before 20 weeks in a natural miscarriage or induced abortion did not "require a birth, death, or still-birth certificate, thus requires legal internment and is treated as a pathological specimen."[25] It is therefore clear that even though the embryo may be considered to be "living tissue" from the moment of conception, legal distinctions of ancient vintage separate the born from the unborn. While the fetus is enfranchised with rights in the area of property, criminal and tort law, there is an absolute prerequisite of live birth in order that these rights be afforded, otherwise, solely the interests of the parents are reflected.

Life is counted from the day of birth, not from the day of conception, and since the law clearly distinguishes between murder and abortion, in every jurisdiction in which a statute has ever been passed, the life of the unborn is separate and distinguished from the life of the born, and as such, the mother's interests must take precedence over the interests of the unborn, whatever such may be.

It is to be regretted that Appellant has misconstrued much of the current legal ferment surrounding the attacks on the constitutionality of anti-abortion laws in the states. Many of these laws were passed when (1) the high risk of

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[25] See Gordon, "*The Unborn Plaintiff*", 63 Mich. L. Rev. 579 (1965); *California v. Belous*, 458 P.2d at p. 202 (1969).

death or disablement of the pregnant female was a serious health factor; (2) the absence of antibiotics made surgery hazardous, when (3) there was an absence of effective local anesthesia; (4) the stigma of non-marital pregnancy was much greater; (5) a pre-existing national pioneer policy of encouraging population growth was in effect; (6) the crudity of medical knowledge in the middle and late 19th century making an abortion at that time (and when most of the state statutes were passed) a serious surgical procedure with unknown consequences for the mother; and (7) there existed the belief that medical interference with pregnancy was abhorred by clerical and secular authority alike as an inhuman abomination, a view adopted by most so-called civilized societies, and which, like many incomprehensible fables persists to this day.[26] Indeed, the Wisconsin Statute here at issue was first passed by the Wisconsin state legislature in 1849 and amended in 1858, 1878, 1898, 1925, 1947, and 1955.[27]

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[26]This is specifically commented upon in the Model Penal Code:

> "Abortion is opposed by some on the ground of physical or psychic danger to the woman or as an inhibitor of population growth. But is it clear that the main factor accounting for laws against abortion is ethical or religious objection." §207.11 at 148, Comment (Tent. Draft No. 9, 1959).

In effect what has happened is that a group of statutes once passed to protect the pregnant woman now have their focus on the continued existence of the fetus, an interest never before recognized.

[27]Wisconsin's abortion law was created by the revised statutes of the State of Wisconsin, passed January 10, 1849, *Chapter 133 Section 10*:

> "The willful killing of an unborn quick child, by any injury to the mother of such child, which would be murder if it resulted in the death of such mother, shall be deemed manslaughter in the first degree."

Section 11:

> "Every person who shall administer to any woman pregnant with a quick child, any medicine, drug, or substance

Appellee herein differs from Appellant herein as to Appellant's statement[28] that "This appeal, however, raises

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whatever, or shall use or employ any instrument or other means, with intent thereby to destroy such child, unless the same shall have been necessary to preserve the life of such mother, or shall have been advised by two physicians to be necessary for such purpose, shall, in case the death of such child or of such mother be thereby produced, be deemed guilty of manslaughter in the second degree."

Section 22 Punishment.

First degree manslaughter—Not less than seven years in the State prison;

Second degree manslaughter—Not more than seven years nor less than four years at State prison;

The Revised Statutes of the State of Wisconsin, 1858, Chapter 164 Section 10 eliminated the word "quick" and substituted the word "any" for "and", so that the particular Section read:

"The willful killing of any unborn child by any . . . ."

The word "quick" was also eliminated from Section 11, so that same read:

"Every person who shall administer to any woman pregnant with a child . . ."

The penalty sections remained the same.

The Revised Statutes of the State of Wisconsin, 1858, Chapter 169 created Section 58 and Section 59 as additions to the Wisconsin abortion law and read as follows:

Section 58: Attempts to Procure Abortion or Miscarriage.

"Every person who shall administer to any pregnant woman, or prescribe for any such woman, or advise or procure any such woman to take, any medicine, drug or substance or thing whatever, or shall use or employ any instrument or other means whatever, or advise or procure the same to be used, with intent thereby to procure the miscarriage of any such woman, shall upon conviction be punished by imprisonment in a County Jail, not more than one year nor less than three months, or by fine, not exceeding Five Hundred Dollars, or by both fine and imprisonment, at the discretion of the Court."

broader questions of far more pervasive import than does the appeal in *Vuitch*. In *Vuitch*, the lower court ruled *only*

Section 59:

> "Every woman who shall take any medicine, drug or substance, or thing whatever, or who shall use or employ any instrument, or shall submit to any operation or other means whatever, with intent to procure a miscarriage, shall upon conviction be punished by imprisonment in a County Jail, not more than six months nor less than one month, or by a fine, not exceeding Three Hundred Dollars, or by both fine and imprisonment, at the discretion of the Court."

The Revised Statutes of the State of Wisconsin, 1878, renumbered Section 10 to Section 4347; renumbered Section 11 to 4352; renumbered Section 58 to 4583; and renumbered Section 59 to Section 4584. The only significant changes being in the penalty sections limiting the imprisonment for a conviction of first degree manslaughter to not more than ten years nor less than five years; and increasing the penalty under 4583 to not more than one year or six months (instead of three months) or by a fine not exceeding $500.00 or less than $250.00. The penalty section of 4584 was changed to read:

> "by a fine not exceeding $100.00 . . ."

and deleted:

> ". . . and by both fine and imprisonment".

The Wisconsin Statutes of 1898 made no legislative changes.

The Laws of 1925 Chapter 4, renumbered all of the sections without any change in substance, except for the penalty of first degree manslaughter, which was changed to:

> "Imprisonment not to exceed ten years or less than five years",

and second degree manslaughter:

> "not to exceed seven years or less than four years."

The Wisconsin Statutes of 1947 Chapter 446, again, amended the penalty clause of the original Section 58, calling for:

> "A fine of not less than $1,000.00 nor more than $5,000., or imprisonment in the State prison of not less than one year nor more than three years, or both."

Chapter 447 of the 1947 Statutes was another act to renumber the sections and increase the penalty of the old Section 59, so that a violation of the same was designated:

(emphasis supplied) that the District of Columbia abortion statute was unconstitutionally vague." Counsel for Appellee also being counsel for Appellee in *Vuitch* states with requisite humility, that such an erroneous interpretation of Judge Gesell's opinion in *Vuitch* is but a minor indication of other, more grievous errors (which shall be adverted to below) that have been made by Appellant.

The error as to *Vuitch* is, of course, that the appeal therein raises serious questions as to equal protection aspects, the Ninth Amendment "right of privacy", the First Amendment "freedom of association", the questions as to whether a doctor's due process rights are affected by a shift of the burden of proof from the prosecution to him, namely, that his medical action was "necessary" to preserve the mother's "health" or "life". And Appellant's simplified formula for "correcting" the defect in the District of Columbia statute ("substituting a less ambiguous statute for the one found wanting")[29] is gratuitous nonsense.

The focal non-sequitur in Appellant's argument is found in Appellant's inability to perceive (or perhaps, subconscious refusal to accept) that the three-judge District Court had actually and correctly held *Wisconsin has no power to enact a statute, proscribing a surgical procedure for a patient freely seeking a competent licensed doctor's advice*

"Murder in the third degree",

and added:

"In case the death of the mother is produced it is unnecessary to prove that the fetus was alive when the act so causing her death was committed."

The Laws of 1955 Chapter 676 Section 1, repealed all of the aforestated abortion laws and created:

"Title XLV" entitled *"Criminal Code"* creating *"Section 940.04"* –which is Wisconsin's present abortion law statute.

[28] Jurisdictional Statement, page 9.

[29] *Ibid.*,

and acting upon such advice, for the reason, inter alia, that the state does not have a sufficiently compelling reason which would constitutionally override the right of the patient to receive and the doctor to give medical advice of this nature. On July 7, 1970, the United States Court of Appeals for the First Circuit in *Baird v. Eisenstadt* (No. 7578, 1st Cir.,) extended the *Griswold* doctrine (insofar as this Court had considered the "right of marital privacy" to include contraceptive advice rendered by a physician to be a protected Ninth Amendment right) to include the constitutionally protected right to distribute a particular contraceptive device, holding that a state statute which prohibited such distribution was constitutionally offensive. In the words of Mr. Justice Clark: "If an individual may prevent conception, why can he not nullify that conception when prevention has failed?"[30]

Associated with the right to marry is the right to raise children, if one chooses, without arbitrary governmental interference. A unanimous Court has held that "the right to have offspring" is a constitutionally protected "human right" which cannot be taken away by a discriminatory statute requiring the sterilization of some persons convicted of crime, but not of others.[31] The right to have or not to have offspring is not mentioned in the Constitution, but this Court had no difficulty in finding that such a "human right" was protected by the Constitution and that is what the District Court below found to be the situation here. The District Court found that "the state does not have a compelling interest even in the normal situation to require a woman to remain pregnant during the early months following her conception.****The police power of the state does not****entitle it to deny to a woman the basic right

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[30]Clark, *Religion, Morality and Abortion: A Constitutional Appraisal*, 2 Loyola Univ. (L.A.) L.R. 1, at p. 9 (1969).

[31]*Skinner v. Oklahoma*, 316 U.S. 535, 536 (1942).

reserved to her under the Ninth Amendment to decide whether she should carry or reject an embryo which has not quickened."[32]

Appellant complains bitterly (and one might fairly surmise the degree of bitterness is linked to theological rather than legal considerations) that the "right of marital privacy" asserted by the District Court and grounded in years of decision by this Court[33] supports a "private right" of "*one member* of the family unit to destroy another potential member of that family unit, without the consent of other members or for that matter without even having to *consult* with, for example, the father of the unborn child she, herself, unilaterally elects to destroy."[34] With this statement, Appellant's real argument, such as it is, is partially unmasked. The entire contention of Appellant, asserting an assumed "consent" by a husband, or a boy friend (although this everyday fact is unmentioned by Appellant in his theological assault on *Griswold*) or some "member of the family" supports Appellee's conclusion that Appellant is arguing a religious thesis from which he translates a non-existent societal interest in implementing a religious morality sufficient to serve as a basis for upholding a constitutionally offensive state law. The State should adopt a posture of solidity and silence between the theological extremists and those who wish to make their own decisions, with or without the consent of males who, after

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[32]310 F. Supp. 293, at page 302.

[33]Mr. Justice Gray, in *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1890). "No right is more sacred, or is more carefully guarded, by the common law than the right of every individual to the possession and control of his own person, free from all restraint and interference of others. . . ."; Mr. Justice Harlan, in *Poe v. Ullman*, 367 U.S. 497, 552 (1961): "Of this whole 'private realm of family life' it is difficult to imagine what is more private or more intimate than a husband and wife's marital relations." (dissenting).

[34]Emphasis original, Jurisdictional Statement, p. 14.

all can walk away from a pregnancy with impunity, while the woman has to make her own difficult decision.[35] Accordingly, it is Appellee's earnest and sincere hope that the time has come for this Court to assert the freedom of female citizens from prescribed statutory incubations and to reject once and for all, the shrill cries of Appellant and others who believe as he does that if the three-judge District Court meant to approve a "private right" which permits a woman to decide to sustain, eliminate or deal in any way she chooses with a pregnancy, then such a theory would justify infanticide, euthanasia, and for that matter "plain simple, old-fashioned murder" and that then, such a proposition would enshrine a "terrifying principle" in our laws. Appellant may be excused the comment that this legal fantasy, an unreal parade of non-existent horrors, flows flawlessly from the non-sequitur of its hypothesis.

III.

CHAPTER 940.04 OF THE STATUTES OF THE STATE OF WISCONSIN, 1967, IS UNCONSTITUTIONAL IN THAT IT IS INTERNALLY INCONSISTENT, VAGUE, AND AMBIGUOUS.

Appellant cites the Wisconsin statute which the District Court below declared unconstitutional in part as grounds for asserting Appellee's lack of "standing". Although Sections 940.04(2), (3), and (6) are not directly discussed in the District Court's declaration of unconstitutionality, it is obvious that Appellant is using these sections of the statute to make his argument that the physician, not being the "pregnant woman", has no standing to argue the constitutional rights of the pregnant woman and indeed, Appellant argued (circuitously as it turns out) that under this statute,

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[35] *Id.*, page 15.

the pregnant woman becomes the complaining witness against the doctor. If the Court will examine Section 940.04(2), (3) and (6), it will perceive a most amazing, almost grimly humorous contradiction. Section 940.04(2) provides a $200 fine and a 6-month term for a woman who induces her own abortion; and Section 940.04(3) provides up to 15 years in prison for the same woman who induces her own abortion of an unborn "quick" child. Yet, a reading of 940.04(6) demonstrates that the framers of this legislation were so confused that they defined an unborn child as in being from the moment of conception to the time of live birth. Thus, despite the attempt on the part of the legislators to distinguish between an "unborn" and an "unborn, quick" child and to provide separate penalties ranging from a misdemeanor class of penalty all the way up to a serious felony penalty, the definition of "unborn" is so vague and confusing that no distinction between the misdemeanor and the felony can ever be made. Accordingly, it is submitted the Court must look at the entire statute, and although the issue is not directly raised by the Jurisdictional Statement, strike it down as internally inconsistent, vague and ambiguous, and thus violative of the rule that criminal statutes must clearly set forth the proscribed conduct so as to advise all persons affected precisely what it is the legislature wishes to delineate as criminal.

IV.

APPELLEE HAS STANDING TO RAISE HIS OWN INTERESTS AND THOSE OF HIS PRESENT, PAST, AND PROSPECTIVE PATIENTS, BECAUSE CHAPTER 940.04 OF THE STATUTES OF THE STATE OF WISCONSIN IS DIRECTED AGAINST APPELLEE AND OTHER PHYSICIANS, WHOSE INTERESTS ARE INTIMATELY RELATED TO THOSE OF THEIR PATIENTS, ENFORCEMENT IS SOLELY AGAINST PHYSICIANS, AND THE RIGHTS OF PATIENTS WOULD BE INADEQUATELY PROTECTED UNLESS CONSIDERED ALONG WITH THOSE OF APPELLEE AND OTHER PHYSICIANS.

STANDING TO ASSERT APPELLEE'S INTERESTS

Appellant has alleged that the challenged statutes directly inhibit his own interests in providing adequate medical advice and treatment to patients. These interests are aspects of "liberty" and "property" directly protected by the Fourteenth Amendment. There can no longer be doubt that the opportunity to pursue one's profession is encompassed within the concepts of "liberty" and "property." This has been the teaching of decisions involving members of and aspirants to the bar,[36] teachers,[37] scientists,[38] and physicians[39] as well. This case, moreover, involves "a deprivation of the personal liberty to pursue a calling of one's choice" rather than the right to receive "the profits or

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[36] *Willner v. Committee on Character and Fitness*, 373 U.S. 96, 102-03 (1963); *Schware v. Board of Bar Examiners*, 353 U.S. 232, 238-39 (1957); *LSCRRC v. Wadmond*, 299 F. Supp. 117, 122 (S.D. N.Y. 1969), *prob. juris.* noted, 38 U.S.L.W. 3247 (U.S. Jan. 12, 1970) (No. 696).

[37] *Slochower v. Board of Higher Educ.*, 350 U.S. 551 (1956); *Bomar v. Keyes*, 162 F.2d 136 (2d Cir.), *cert. denied*, 332 U.S. 825 (1947).

[38] *Greene v. McElroy*, 360 U.S. 474, 492 (1959).

[39] *Birnbaum v. Trussell*, 371 F.2d 672 (2d Cir. 1966).

emoluments deriving therefrom."[40] The obstetrician-gynecologist receives far greater recompense from the patient who chooses continued childbirth over early interruption of pregnancy.[41]

The present case, therefore, is wholly unlike *Tileston v. Ullman*, 318 U.S. 44 (1943) (*per curiam*). There a physician, who claimed no rights whatsoever of his own, sought declaratory relief against a statute which prohibited *patients* from *using* contraceptives. It was twenty-one years later before that statute was authoritatively construed to cover prescription of contraceptives.[42] Here, a physician is being actively prosecuted under direct enforcement provisions of the challenged statute. In *Tileston*, there were "no allegations asserting any claim under the Fourteenth Amendment of infringement of [his] liberty or his property rights." 318 U.S. at 44.

Not only has Appellee

> "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Baker v. Carr*, 369 U.S. 186, 204 (1962), quoted in *Flast v. Cohen*, 392 U.S. 83, 99 (1968),

but the State here has shown a record of repeated and determined efforts to enforce the provisions of an unconstitutional State statute against him.

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[40] *Eisen v. Eastman*, 421 F.2d 560, 565 (2d Cir., 1969).

[41] A woman who has a baby will remain four or five days in the hospital, while hospital stays for therapeutic abortion are of much shorter duration and where an abortion is performed by a competent physician in his office may involve only a few hours of time.

[42] *Griswold v. Connecticut*, 151 Conn. 544, 200 A.2d 479 (1964), rev'd, 381 U.S. 479 (1965).

STANDING TO ASSERT THE INTERESTS OF PATIENTS

Appellee has further invoked the rights of his present, past, and prospective patients. A pregnant woman is generally in no position to undertake protracted litigation to establish her right to an abortion.[43] Most doctors have yet to see such a course followed or pursued, usually because the patient objects to the publicity that would be attendant. Moreover, the task of judicial deliberation requires more time than an isolated pregnant patient may have. If her rights are adjudicated as a member of a general class consisting of a physician's patients, however, she and others similarly situated will not have the impossible burden of seeking judicial relief from each unwanted pregnancy.

The present case, then, is a close parallel to *Griswold v. Connecticut*, 381 U.S. 479 (1965), because:

> "[t]he rights of [patients] are likely to be diluted or adversely affected unless those rights are considered in a suit involving [physicians] who have this kind of confidential relationship to them." 381 U.S. at 479.

Similarly, it has been repeatedly held in abortion cases that the physician may assert his patient's rights, a proposition which *California v. Belous* considered so self-evident as to justify no more than a footnote.[44]

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[43]This was unsuccessfully tried on one occasion by one Sherri Finkbine, an Arizona housewife who had ingested thalidomide. *Good Samaritan Hospital v. Attorney General* (Super. Ct. Ariz., July 30, 1962). See Finkbine, *The Lesser of Two Evils* in *The Case for Legalized Abortion Now*, 15 (A. Guttmacher ed. 1967). She received "thousands of pieces of hate mail [and] the official Vatican newspaper . . . ." pronounced "her [and her husband] in very bold print as murderers." *Id.* at 20. The Superior Court of Arizona declined to hear her case, and she was eventually aborted in Sweden. *Id.*

[44]71 Cal.2d 996, 1005 n. 5, 458 P.2d 194, 199 n. 5, 80 Cal. Rptr. 354, 359 n. 5 (1969) ("Dr. Belous' standing to raise this right is unchallenged").

In light of Appellee's direct involvement in the day to day effects and enforcement of the statute, he is situated in much the same way as the defendant covenantor in *Barrows v. Jackson*, 346 U.S. 249 (1953), because here as there "it would be difficult if not impossible for the persons whose rights are asserted to present their grievances before any court." 346 U.S. at 257. Pregnant women should not be forced into the embarrassment, cost, and delay of litigating their claims at the mercy of those exigencies which surround their individual cases. The Constitution is not a document which requires the impossible, particularly where medical doctors are already before the Court with standing to raise rights complementary to those of their patients.[45]

Appellee is directly affected by the law in a concrete and recurring manner, including present efforts to prosecute him, deterred and hampered by the law in advising and treating his patients, and compelled to refuse to treat patients in accordance with acceptable standards of medical practice out of a reasonable fear of enforcement of an unconstitutional statute. Appellee has successfully, in part, challenged the statute not only because it stands in the way of providing safe, adequate medical treatment for large numbers of patients with unwanted pregnancies, but because of its personal impact upon him and his patients.

One could scarcely doubt that an individual pregnant woman could maintain an action for declaratory relief and damages if she were unlawfully or unconstitutionally denied a therapeutic abortion by a suable public hospital. Similarly, a physician could maintain such an action in an individual case if he were denied the use of hospital facilities for unlawful, or unconstitutional reasons. But where

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[45] See also *Truax v. Raich*, 239 U.S. 33 (1915); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); see generally Sedler, *Standing to Assert Constitutional Jus Tertii*, 71 Yale L.J. 599 (1962).

a physician is prosecuted under a statute which a federal court adjudicates as unconstitutional and his rights are continuously threatened to the point where he must abandon his practice out of sheer harassment, what recourse does he have if his "standing" to raise these points is attacked? No civilized legal system should require a physician practicing his profession to risk prison and disgrace in a contest with the State over a statute already held unconstitutional[46] without affording him the requisite standing. This must be particularly true when the statute affects his everyday behavior in a very specific, recurring situation.

V.

THE LOWER COURT SHOULD NOT HAVE ABSTAINED FROM ISSUING AN INJUNCTION RESTRAINING THE PENDING STATE PROSECUTION OF APPELLEE. THIS COURT SHOULD PERMANENTLY ENJOIN THE STATE PROSECUTION OF APPELLEE AND SHOULD DECLARE THE ENTIRE WISCONSIN ABORTION LAW UNCONSTITUTIONAL AND INVALID.

Abstention by the lower court was, and by this Court would be wholly unjustified in that an injunction was sought (and denied below) against a state statute on the ground that the statute contravened the United States Constitution, on its face and as applied, and no other grounds, and no state court interpretation could have met Appellee's claims, without deciding the federal questions themselves, although Appellee sought unsuccessfully to avail himself of the relief suggested below.

The rights invoked below are aspects of personal liberty, "genuine" federal civil rights, as contrasted with purely

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[46] A corollary in the not infrequent condemnation of those who flagrantly break a law to test its validity.

economic interests.[47] Accordingly, neither abstention nor any other avoidance of jurisdiction was appropriate.

As Judge Murrah stated:

> "We yet like to believe that wherever the Federal courts sit, human rights under the Federal Constitution are always a proper subject for adjudication, and that we have not the right to decline the exercise of that jurisdiction simply because the rights asserted may be adjudicated in some other forum."[48]

In the words of *Dombrowski*, the mere threat of prosecution itself "may inhibit the full exercise of the First Amendment freedoms."[49] See also *Keyishian v. Board of Regents*, 385 U.S. 589 (1967); *Elfbrandt v. Russell*, 384 U.S. 11 (1966); *Baggett v. Bullitt*, 377 U.S. 360 (1964). To permit criminal prosecution in a Ninth Amendment setting undermines the maintenance of a system of freedom of choice by effectively interfering with the doctor-patient relationship under the threat of the ordeal of a criminal trial. Similarly, in the context of the instant case, physicians such as Appellee positively refrain from treating and advising patients for the reason that they fear criminal prosecution. They are not uninterested citizens urging an academic question, but are a class of citizens greatly affected and deterred by the challenged statutes. As Professor Bickel suggested, in a slightly different context, "it may be true that by hypothesis no more suitable case can ever be constructed, because those who are unjustly deterred will never be prose-

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[47] See *Eisen v. Eastman*, 421 F.2d 560 (2d Cir., 1969); *Hague v. CIO*, 307 U.S. 496 (1939).

[48] *Stapleton v. Mitchell*, 60 F. Supp. 51, 55 (D. Kans.), *dismissed per stip.*, 326 U.S. 690 (1945), quoted with approval in *McNeese v. Board of Educ.*, 373 U.S. 668, 674, N. 6 (1963); and *Wright v. McMann*, 387 F.2d 519, 523 (2d Cir., 1967).

[49] *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965).

cuted, and what deters them is precisely the prospect of litigation."[50] Appellee in the instant case is in a sensitive profession. He sought and secured a judicial determination of the law as a result of a criminal prosecution and in order to treat his patients more adequately. To require him to undergo continued criminal prosecution would harm the pursuit of his professional activity in a severe and unnecessary fashion, to say nothing of the deleterious effect on his patients.

Appellee sought the vindication of important and personal constitutional rights, rather than mere economic interests. Moreover, he faced an even greater risk than was present in the economic interest cases, that of possible loss of personal liberty by imprisonment, a penalty which is inapplicable to a corporation. This Wisconsin law creates enormous problems, which recur daily, for physicians and patients. Unfortunately, the statute, contradictory on its face, is "a vital fact of life" in Wisconsin, and Appellant's eagerness to prosecute Appellee and other physicians appears to be quite clear, although it is concededly anomalous that no physician in Wisconsin ever before raised the question of the statute's unconstitutionality in over 100 years of so-called statutory abortion control.

The issues here raised and raised below are *federal* questions. There are three levels of state courts, and further review is discretionary. Two of the three levels of Wisconsin courts have declined to adhere to the decision below.

The jurisdictional statute here invoked

> "imposed the duty upon all levels of the federal judiciary to give due respect to a suitor's choice of a federal forum for the hearing and decision of his federal constitutional claims. Plainly, escape from that duty is not permissible merely because state courts also have the solemn responsibility equally

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[50] A. Bickel, *The Least Dangerous Branch*, 149-59 (1962).

> with the federal courts, ('***to guard, enforce, and protect every right granted or secured by the constitution of the United States***'" *Zwickler v. Koota*, 389 U.S. 241, 248 (1967).

Appellee's central claim, moreover, was not simply that the statute was vague, but that on any reasonable construction it "sweeps unnecessarily broadly and thereby 'invades the area of protected freedoms,'" *Zwickler, supra*, 389 U.S. at 250, and cases cited. *Zwickler*, it should be noted, is not limited to the First Amendment context,[51] but pointed to decisions involving freedom of association[52] and the right to practice one's profession.[53]

Abstention, as announced below, was plainly inappropriate in the setting of this case. It was merely productive of delay and further damage. There was no reason to abstain from enjoining the criminal prosecution.

In coercing Appellant to undergo continued criminal prosecution, he and his patients are being subjected to an inordinate degree of hardship. A pregnancy will not outlast the time for a thorough consideration in the State and federal courts of constitutional issues. This Court should affirm the lower court's declaratory ruling and reverse that court's refusal to issue an injunction.

The constitutionality of state abortion laws has been much in the minds of judges and commentators even before the landmark decision of *California v. Belous*.[54]

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[51] Appellee, however, asserted those First Amendment rights involved in his associations with patients, i.e., the giving of advice.

[52] *NAACP v. Button*, 371 U.S. 415 (1963).

[53] *Schware v. Board of Bar Examiners*, 353 U.S. 232 (1957).

[54] 71 Cal.2d 996, 458 P.2d 194, 80 Cal. Rptr. 354 (1969), *cert. denied*, 397 U.S. 915 (1970).

Professor Emerson at Yale suggested in December of 1965 that the *Griswold* case might open the way "for an attack upon significant aspects of the abortion laws."[55] Retired Justice Tom C. Clark, writing in 1969, fully agreed.[56] Recognizing that "[if] the medical profession is to be accorded complete protection, it will have to come through the judicial system,"[57] Justice Clark suggested that, constitutionally, "until the time that life is present," the State cannot interfere with the interruption of pregnancy through an abortion.[58]

There has been dissent from this position, however, in both religious[60] and secular circles.[61] The latter generally

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[55]Emerson, *Nine Justices in Search of a Doctrine*, 64 Mich. L. Rev. 219, 232 (1965).

[56]Clark, *Religion, Morality, and Abortion: A Constitutional Appraisal*, 2 Loyola Univ. (L.A.) L. Rev. 1 (1969);

[57]Clark, p. 7

[58]*Id.*, at 8.

[59]Lucas, *Federal Constitutional Limitations on the Enforcement and Administration of State Abortion Statutes*, 46 N.C.L. Rev. 730 (1968). For a historical approach to unconstitutionality, see Means *The Law of N.Y. Concerning Abortion and the Status of the Foetus, 1664-1968: A Case of Cessation and Constitutionality*, 14 N.Y.L.F. 411, 500-515 (1968). See also, Note, *Constitutional Aspects of Present Criminal Abortion Law*, 3 Valpr. U.L. Rev. 102 (1968).

[60]Byrne, *Demythologizing Abortion Reform*, 14 Cath. Law 180 (1968); Note, *Abortion Legislation and the Establishment Clause*, 15 Cath. Law. 108 (1969).

[61]Byrne, *The Abortion Question: A Nonsectarian Approach*, 11 Cath. Law. 316 (1965); Louisell, *Abortion, the Practice of Medicine and the Due Process of Law*, 16 U.C.L.A. L. Rev. 233 (1969).

assert that an embryo from fertilization has a constitutional right to remain undisturbed by induced abortion. They have not, however, embraced the concept of compulsory confinement of women for treatment to prevent spontaneous abortion.[62]

Several courts have already faced the various constitutional questions presented in this action. The first, a lower court in California, ruled on September 24, 1968, that the pre-1967 abortion statute in that state, which was similar to earlier Wisconsin abortion statutes, violated the Eighth and Fourteenth Amendment rights of certain patients. Their physicians were charged with unprofessional conduct.[63] The latter had performed hospital-approved therapeutic abortions on patients who had been exposed to the German measles virus.

One year later the Supreme Court of California rendered its decision in *California v. Belous*. A close reading of Judge Peters' opinion reveals four separate grounds for the decision: (1) facial unconstitutional uncertainty;[64] (2) unconstitutional abridgement of the woman's right to choose whether to bear children,[65] if (a) the statute were construed to require "certainty of death,"[66] or (b) if the

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[62]Estimates are that 10 to 50 percent of all fertilized human ova abort spontaneously. Tietz & Martin, *Foetal Deaths, Spontaneous and Induced, in the Urban White Population of the U.S.*, 11 Population Studies 170 (1957); Erhardt, *Pregnancy Losses in New York City*, 1960, 53 Am. J. Pub. Health 1337 (1963); Warburton & Fraser, *Spontaneous Abortion Risks in Man*, 16 Am. J. Human Genet. 1 (1964).

[63]*Shively v. Board of Medical Examiners*, No. 590333 (Cal. Super Ct. San Fran. Cty. Sept. 24, 1968) (not reported), *on remand from* 65 Cal. 2d 475, 421 P.2d 65, 55 Cal. Rptr. 217 (1968) (granting physicians' motions for discovery).

[64]71 Cal.2d at 1103, 458 P.2d at 197, 80 Cal. Rptr. at 357.

[65]71 Cal.2d at 1005, 458 P.2d at 199, 80 Cal. Rptr. at 359.

[66]71 Cal.2d at 1005, 458 P.2d at 199, 80 Cal. Rptr. at 359.

statute were construed to "prohibit an abortion, where death from childbirth although not medically certain, would be substantially certain or more likely than not,"[67] (3) unconstitutional uncertainty if the statute were construed to mean "'substantially or reasonably' necessary to preserve"[68] the woman's life; and (4) A Fourteenth Amendment violation because of "[t]he delegation of decision-making power to a directly involved individual. . . ."[69]

Judge Burke, dissenting, addressed himself solely to the vagueness issue,[70] as did dissenting Judge Sullivan.[71]

Two months later Judge Gesell, of the United States District Court for the District of Columbia, decided *United States v. Vuitch*.[72] While the decision holds that "preservation of the mother's life or health"[73] is unconstitutionally vague, the court acknowledged significant constitutional problems respecting presumption of guilt, right not to bear children, and systematic discrimination against the poor. Due to the wording of the District of Columbia statute, however, that case has some bearing on the present controversy.[74] Actions are pending before a single federal judge

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[67] 71 Cal.2d at 1012, 458 P.2d at 203, 80 Cal. Rptr. at 363.

[68] 71 Cal.2d at 1012, 458 P.2d at 204, 80 Cal. Rptr. at 365.

[69] 71 Cal.2d at 1015, 458 P.2d at 206, 80 Cal. Rptr. at 366.

[70] 71 Cal.2d at 1016, 458 P.2d at 206, 80 Cal. Rptr. at 366.

[71] 71 Cal.2d at 1022, 458 P.2d at 210, 80 Cal. Rptr. at 370.

[72] 305 F. Supp. 1032 (D.D.C. Nov. 10, 1969) (No. 84, U.S. Sup. Ct., Oct. Term, 1970).

[73] D.C. Code Ann. §22-201 (1961).

[74] *California v. Robb*, Nos. 149005 and 159061 (Calif. Mun. Ct. Orange Cty. Jan. 9, 1970), has recently invalidated the current California abortion statute in a criminal prosecution of a physician. The decision, set out in Appendix "D", rests upon numerous grounds, including the right of a woman to decide whether to bear children,

in Chicago, *Doe v. Scott*, No. 70-C-395 (N.D. Ill., filed Feb. 20, 1970), and in New Jersey, *Young Women's Christian Association of Princeton v. Kugler*, Civ. Action No. 264-70 (D.N.J., filed March 5, 1970). A three-judge federal Court in *Roe* and *Hallford v. Wade* has held the Texas statute unconstitutional, as noted above.

CONCLUSION

It is now common for a state whose statutes are enmeshed in Federal constitutional questions raised by complainants before three-judge courts to complain that the individual raising personal constitutional issues involving freedom of association, or the right to marital privacy, has no "standing" to attack the statute involved unless his individual constitutional rights are in jeopardy, without consideration of the "nexus" test previously discussed.

The subject matter is so current that at the time of the writing of this Motion to Affirm, the United States Court of Appeals for the First Circuit, *Baird v. Eisenstadt, supra*, the same claim being made in the case at bar was

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and the presence of economic discrimination in violation of the equal protection clause of the Fourteenth Amendment. Coming from a municipal court, however, its force is only so persuasive as its reasoning, which, where applicable, will be brought out in this Brief, *infra*.

In June of 1969, the Supreme Judicial Court of Massachusetts sustained its abortion statute over a challenge of vagueness. *Kudish v. Board of Registration*, 248 N.E.2d 264 (1969) (not appealed). As construed, however, that statute is similar to the provisions struck down in *United States v. Vuitch, supra*, and quite unlike the abortion statute here involved.

Similarly, *Moretti v. New Jersey*, 52 N.J. 182, 244 A.2d 499, *cert. denied*, 393 U.S. 952 (1968), upheld the abortion law of that state over a vagueness challenge. The New Jersey law, however, prohibits abortions performed "maliciously or without lawful justification," N.J. Stat. §2A:87-1, and the abortion in that case was said to have been performed by an inspector for the State Board of Barber Examiners.

made by the State of Massachusetts with reference to the right of Baird, convicted of violating a state statute prohibiting the distribution of contraceptives, to assert the constitutional rights of unmarried women to receive such contraceptives. In a *per curiam* opinion, the Court said (at p. 9) "petitioner is being jailed for a direct violation of that statute; he must have as much standing to protest as anyone else. In this connection we observe that by criticizing him for not seeking declaratory relief instead of acting so as to invite arrest, the Massachusetts court implicitly recognized petitioner's standing and interest. (1969 Massachusetts A.S. at 735). We will do no less."

In the case at bar, Appellee sought declaratory and injunctive relief from, first, the single district judge who agreed to convene the three-judge court, then from the three-judge court itself, and finally, from a single member of the three-judge court after Appellee had exhausted his alleged state court remedies. He received partial declaratory relief in the three-judge court but has been left in the anomolous position of being actively prosecuted under a statute declared unconstitutional. We have contended here that the entire statute must fall.

Appellee earnestly submits that this Court should strike down the entire Wisconsin statute for the reasons heretofore mentioned and a judgment directing that the state courts and state prosecutors of Wisconsin be enjoined from prosecuting Appellee further under this invalid statute.

For the reasons set forth herein, Appellee submits that the questions presented by Appellants are unsubstantial and

that the decision of the court below, with the further judicial relief herein requested, be affirmed.

Respectfully submitted,

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APPENDIX A

STATE OF WISCONSIN,

Plaintiff

v.

SIDNEY BABBITZ,

Defendant

H-371

MOTION TO DISMISS DENIED

April 6, 1970

Before the
HON. HERBERT J. STEFFES,
Circuit Judge, Presiding

CHARGE: ABORTION

APPEARANCES:

TERENCE EVANS, Assistant District Attorney, for the State

NATHANIEL ROTHSTEIN and MILTON BORDOW for Defendant

(DEFENDANT NOT PRESENT IN COURT)

* * *

MR. ROTHSTEIN: If the Court please, we filed a formal motion to dismiss and we accompanied it with a copy of the decision in the Federal Court.

THE COURT: By the three-Judge panel?

MR. ROTHSTEIN: Yes.

MR. BORDOW: And the judgments.

THE COURT: Anything else you want to add?

MR. ROTHSTEIN: Nothing more. I think those perhaps speak for themselves.

THE COURT: I think they do. They deny an injunction and suggest that the State Court will protect the constitutional rights of the defendant, and that is as I read the case.

And was there a declaratory judgment there? What does the State intend to do?

MR. EVANS: As the Court is aware, I believe, the State has taken steps requesting a review of that decision by the U.S. Supreme Court.

THE COURT: I am not aware of that.

MR. EVANS: We have filed a notice of appeal with the Clerk of the Federal District Court to have the records transferred to the U.S. Supreme Court for review.

Our opinion—and when I say that—I mean Mike Ash from our office and Mr. McCann, the District Attorney, have done most of the work on this case, but the opinion is that the decision of the three-Judge panel of the Federal District Court, as couched, is not binding on this Court and does not restrain this Court from proceeding.

We do, of course, disagree with the decision, but because we feel we are not bound by it we would like to proceed with this case.

THE COURT: Well, how do you want to handle it, do you want to set it down for trial?

MR. EVANS: That, I believe, would be the thing that should be done.

THE COURT: I don't believe the defendant is here, is he?

MR. ROTHSTEIN: The defendant is not here. If Your Honor please, we don't think that argument is tenable. The decision knocked out the pertinent subsections under which this man is charged—subsection (1) and subsection (5).

THE COURT: Well, I'm not going to "knock it out," because I don't consider that the constitutionality should be determined at this level. It should be determined by an Appellate Court.

MR. ROTHSTEIN: It was determined by an Appellate Court.

THE COURT: Not by an Appellate Court that has any binding effect on this court. The injunction was denied.

MR. ROTHSTEIN: But the statute was declared unconstitutional. I believe that Court pre-empts this Court.

THE COURT: I don't believe so. It doesn't say so.

MR. ROTHSTEIN: It doesn't say that the injunction will lie because of the matter of abstention, but certainly if the Federal Court knocked out the very statute, the very subsections of the statute upon which this man is being informed against how can this Court proceed.

THE COURT: By virtue of the decision. It doesn't say anything to the contrary.

MR. ROTHSTEIN: But—

THE COURT: I am going to proceed, pending any directive from a Court of competent jurisdiction to the contrary.

MR. ROTHSTEIN: We don't see how you can.

THE COURT: I don't see how I can't. The Federal Court has no jurisdiction here. This is a State prosecution, the Federal Court so said.

MR. EVANS: There has been no challenge before this Court, challenging the constitutionality of the Statute.

MR. ROTHSTEIN: There doesn't have to be.

Would Your Honor desire some memorandum on these matters that Your Honor is discussing?

THE COURT: There is a motion here for dismissal because of the Federal Court decision referred to, is that correct, Mr. Evans?

MR. EVANS: That's correct.

THE COURT: So the motion has been made before this Court.

MR. ROTHSTEIN: This is our motion.

MR. EVANS: There was never a motion made to this Court to have this Court review the constitutionality of the abortion statute. There was in the Federal Court, of course, but as I read the opinion there is nothing in there that prevents us from proceeding.

THE COURT: I agree with you.

MR. ROTHSTEIN: Nothing that prevents you, but there is an admonition to this court, if you want to call it that, that this Court will certainly protect the constitutional rights of this defendant. And the constitutional rights of this defendant have been determined by the Federal Court.

THE COURT: As far as their Federal jurisdiction is concerned, involved in that level of Federal procedure.

MR. BORDOW: We believe it constitutes a mandate.

THE COURT: It doesn't say so.

MR. ROTHSTEIN: Not directly, no.

THE COURT: You asked for an injunction and they refused.

MR. ROTHSTEIN: But on the matter of constitutionality of these very subsections that has been determined.

THE COURT: By that Court.

MR. ROTHSTEIN: By that Court—which pre-empts this Court.

THE COURT: No, it does not.

MR. ROTHSTEIN: It's a higher court.

THE COURT: I disagree.

MR. ROTHSTEIN: It is a higher court.

THE COURT: It isn't a higher court, it has no jurisdiction over State matters at that level.

MR. ROTHSTEIN: It's not a question of jurisdiction over the State matters, it's a matter of constitutionality.

THE COURT: They have not told this Court not to proceed and this Court is not going to delay proceedings if the State wants to proceed.

I have read the decision very carefully. It exhibits the facade of reluctance on the part of the Federal Courts to interfere with State prosecutions on one side of the coin and then proceeds on the merits of the constitutional issue. But it doesn't enjoin this Court from proceeding.

MR. ROTHSTEIN: Judge Steffes, does this Court want to proceed where you have a virtual mandate from the Federal Court knocking out the very statute upon which this information is predicated?

THE COURT: It isn't a matter of whether I want to proceed; it's a matter of this Court proceeding in the absence of any mandate to the contrary from the Federal Court.

If the State wants to proceed and go through the trial with an appeal pending it may do so. I am prepared to proceed with the matter. You tell me how you want to proceed here?

MR. EVANS: We are prepared to set a date for trial.

MR. ROTHSTEIN: The defendant should be here before the matter is calendared.

THE COURT: Yes.

MR. ROTHSTEIN: And I think we might want to give this Court a little memoranda with respect to this matter before you decide the matter finally on the question of the constitutionality of the statute.

THE COURT: I am not going to declare a State statute unconstitutional at this level. I am bearing in mind the decisions of our State Supreme Court. I am not bearing in mind a decision of a three-Judge panel of the Federal Court. They denied an injunction for relief sought by the defendant.

Have the defendant here and we will proceed to set a date and have the arraignment.

MR. BORDOW: Would you set that date far enough in advance so if we want to request the Federal Court to give you a mandate—

THE COURT: They answered your question. They refused.

MR. ROTHSTEIN: They said inferentially—not inferentially, but they said they felt this Court would respect and heed the constitutional rights of this defendant.

THE COURT: The constitutional rights of this defendant will be sacredly upheld in the sanctuary of this Court.

MR. ROTHSTEIN: It's an anomaly by virtue of what the Federal Court has said.

THE COURT: It's their anomaly, not mine. They say I can proceed. I will abide by their gracious acquiescence.

MR. EVANS: If the Wisconsin Supreme Court had rendered an opinion of that nature it would be different.

MR. ROTHSTEIN: This three-Judge panel had the right to hear, try and determine the matter.

THE COURT: In that particular forum, but it is not binding upon me at this stage of the proceedings. They said it's not. There is no injunction, they said so.

Let's set down the date for the arraignment. You name the date.

MR. BORDOW: About a month from now, Your Honor.

THE COURT: Is that agreeable, Mr. District Attorney?

MR. EVANS: Yes, it is.

MR. BORDOW: Sometime in late May or early June?

THE COURT: May 18th, is that agreeable?

MR. ROTHSTEIN: It is.

MR. BORDOW: Yes, Your Honor.

THE COURT: Mr. District Attorney?

MR. EVANS: It is, Your Honor.

THE COURT: All right, at nine o'clock in the morning.

MR. ROTHSTEIN: That's for arraignment purposes only?

THE COURT: For arraignment and setting a date.

So the motion to dismiss is denied.

* * *

STATE OF WISCONSIN)
) SS
MILWAUKEE COUNTY)

I, Patricia Harrington Banachowicz, hereby certify that the attached and foregoing is a true and correct transcript of the proceedings had in the above entitled matter on April 6, 1970, as contained in my original shorthand notes.

/s/ _____
Official Reporter
Circuit Court - Branch 11

APPENDIX "B"

August Term, 1969

STATE OF WISCONSIN IN SUPREME COURT

In re Application of SIDNEY G. BABBITZ

for leave to commence and maintain an original action in said court.

PER CURIAM. Sidney G. Babbitz has filed a petition praying for leave to commence an original action and the State has moved to dismiss. Babbitz alleges he is charged with committing abortion contrary to sec. 940.04(1), Stats., which section he claims is unconstitutional and seeks a declaratory judgment of this court to that effect. Babbitz has heretofore sought the aid of the federal courts and a three-judge court has found sec. 940.04(1) to be unconstitutional in some respect. That decision has now been appealed to the United States Supreme Court. Until this court is certain the United States Supreme Court has taken or rejected jurisdiction of the appeal, it is not inclined to entertain a case to decide the same question. The prayer of the petition for leave to commence an original action in this court is denied without prejudice to reapply when the facts warrant.

APPENDIX "C"

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

SIDNEY G. BABBITZ, M.D.,

Plaintiff,

v.

No. 70-C-221

E. MICHAEL McCANN, District Attorney of Milwaukee County, HERBERT J. STEFFES, Judge of the Circuit Court, Criminal Division, Milwaukee County,

Defendants.

copy mailed to attorneys for parties by the Court pursuant to Rule 77(d) F.R.C.P., and Rule 21-A of District Court.

DECISION AND ORDER

The plaintiff seeks the convening of a three-judge district court and an order enjoining a state criminal prosecution which is currently pending against him in the circuit court of Milwaukee County.

The plaintiff brought an earlier action, No. 69-C-548, in which he sought declaratory and injunctive relief against the same state prosecution of which he now complains. In that case, a three-judge district court was convened, and it declared unconstitutional those sections of the Wisconsin statutes under which the plaintiff is being prosecuted. The three-judge court also concluded that injunctive relief against the pending state prosecution would be inappropriate.

Subsequently, the state circuit court denied a request that it dismiss the pending charges. The plaintiff urges that the

state circuit court's action now justifies the issuance of an injunction by a three-judge federal district court.

The first question which the present application raises is whether a three-judge district court should be convened. In my opinion it should not.

The three-judge district court in No. 69-C-548 has already held that the statute in question is unconstitutional. Accordingly, there is no outstanding substantial federal question present which could require the convening of a three-judge district court. *Turner v. City of Memphis, Tennessee*, 369 U.S. 31 (1962); *Bailey v. Patterson*, 369 U.S. 31 (1962).

The second question which the plaintiff's present suit presents is whether injunctive relief is currently appropriate. The decision of the three-judge district court in case No. 69-C-548 is also dispositive of this issue. The latter court's ruling was made only after a full opportunity for the submission of briefs and for oral argument. In my opinion, further argument on the question of injunctive relief would not be beneficial.

In case No. 69-C-548, the court held that although the plaintffi was entitled to a declaratory judgment in the federal court while his state prosecution was pending, the strong policy of abstention asserted in 28 U.S.C. §2283 and in various decisions of the United States Supreme Court required federal court forebearance from enjoining the pending state prosecution. The possibility that a state prosecution might entail embarrassment and expense to the plaintiff was not found to justify an exception to the vigorous rule of abstention. The plaintiff cannot now complain that he is forced to proceed in two courts since it was his decision initially to enter the second forum.

I conclude that the decision in case No. 69-C-548 fully disposed of both of the issues in the present case.

I deem it necessary to deny the plaintiff's requests for the convening of a three-judge district court and for a temporary restraining order.

Now, therefore, IT IS ORDERED that the plaintiff's motions for the convening of a three-judge district court and for a temporary restraining order be and they hereby are denied.

IT IS FURTHER ORDERED that the action be and hereby is dismissed.

Dated at Milwaukee, Wisconsin, this 11th day of May, 1970.

/s/ _____
U.S. District Judge

D. 1

APPENDIX "D"

IN THE MUNICIPAL COURT OF THE CENTRAL ORANGE COUNTY

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, v. ROBERT CUMMING ROBB, Defendant.	CASE 149005 CASE 159061 OPINION OF THE COURT

The defendant, Robert Cumming Robb, a medical doctor licensed to practice medicine in the State of California, stands before the Court charged with felonies in four counts. The People of the State of California charge in Count I of Complaint 149005, filed September 4, 1969, that Dr. Robb violated on the twenty-sixth day of November, 1968, Section 274 of the Penal Code of the State of California in that in Orange County, California, he willfully, unlawfully and feloniously provided, supplied and administered to Susan Klambara and procured said Susan Klambara to take medicine, drugs and substances, and use and employ an instrument and other means with intent thereby to procure a miscarriage of Susan Klambara, which was not in compliance with the Theapeutic Abortion Act, Chapter 11 of Division 20 of the Health and Safety Code of the State of California.

The People charge in Count II of said complaint a violation of the same statute on the twelfth day of August, 1969, in relation to the intentional miscarriage of Teri Ann Alesandro.

The People charge in Count I of Complaint 159061, filed December 22, 1969, violation of the same statute on the thirtieth day of October, 1969, in relation to the intentional miscarriage of Linda P. Muschetto; and in Count II of said complaint the violation of the same statute on the twenty-ninth day of November, 1969, in relation to the intentional miscarriage of Darice Lombard.

By those two complaints, which have been consolidated, the People charge Dr. Robb with four counts of abortion in violation of what is commonly referred to as the "Therapeutic Abortion Act of 1967.

The defendant, Dr. Robb, has demurred to the complaint and seeks to have the complaint dismissed on the grounds that the complaint fails to state a crime in that Penal Code Section 274 (The Therapeutic Abortion Act of 1967) is in violation of the Constitution of the United States.

In considering this demurrer we must, and we do, assume that the charges alleged in the complaints are true.

The "Therapeutic Abortion Act of 1967," Section 274 of the Penal Code states:

> "Every person who provides, supplies, or administers to any woman, or procures any woman to take any medicine, drug or substance, or uses or employs any instrument or other means whatever, with intent thereby to procure the miscarriage of such woman, except as provided in the Therapeutic Abortion Act Chapter 11 (commencing with Section 25950) of Division 20 of the Health and Safety Code, is punishable by imprisonment in the state prison not less than two nor more than five years."

Chapter 11 of the Health and Safety Code stated in general that a licensed doctor may perform an abortion, if:

First, the operation takes place in a hospital which is accredited by the Joint Commission on Accreditation of Hospitals;

Second, the abortion is approved in advance by a committee of the medical staff of the hospital, which committee is established and maintained in accordance with standards promulgated by the Joint Commission on Accreditation of Hospitals; and

Third, The Committee of the Medical Staff finds that either there is substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the mother, or the pregnancy resulted from rape or incest.

Mental health is defined as mental illness to the extent that the woman is dangerous to herself or to the person or property of others or is in need of supervision or restraint.

Further, the Act provides that upon the receipt of an application for an abortion on grounds that the pregnancy resulted from rape or incest, the Committee shall immediately notify the district attorney of the county in which the alleged rape or incest occurred, and transmit to said district attorney the affidavit of the applicant attesting to the facts establishing the rape or incest.

This is a case of first impression. There has not been any trial or appellate court in the State of California which has considered the constitutionality of the "Therapeutic Abortion Act of 1967." Nor has there been any prior consideration in any of the American jurisdictions of any law similar to the present California law.

The court is mindful of the cases of *People of the State of California v. Leon Phillip Belous*, 71 A.C. 996, and *United States of America v. Milan Vuitch*, United States District Court for the District of Columbia Nos. 1043-68 and 1044-68. These two cases considered the law prior to 1967 in California, and a similar law in the District of Columbia.

People v. Belous held that the term "necessary to preserve" (the life of the woman) used in the law as it existed prior to 1967 was not sufficiently certain to satisfy the due process requirements of fundamental constitutional rights. The Court pointed out that no one may be required at peril

of life, liberty or property to speculate as to the meaning of penal statutes, and that all are entitled to be informed as to what the State commands and forbids.

The Court further states that a woman has a right to life and to choose whether to bear children. The woman's right to life is involved because childbirth involves risks of death.

The right of the woman to choose whether to bear children follows from the United States and California Supreme Courts acknowledgment of a right of privacy or liberty in matters related to marriage, family and sex.

The Court points out that the critical issue is not whether such rights exist, but whether the state has a compelling interest in the regulation of a subject which is within the police powers of the state.

The case of *United States v. Vuitch* considers a statute in which the phrase "as necessary for the preservation of the mother's life or health." The Court adopts the opinion of *People v. Belous* so far as the same language is considered and in addition holds the word "health" is uncertain.

Thus we see that both *People v. Belous* and *United States v. Vuitch* were decided upon the narrow grounds of ambiguity and uncertainty of the language of the statute. As such they have sidestepped and avoided the primary constitutional issues leading to the ultimate question of whether a legislature may in 1970 enact any law prohibiting the performance of an abortion by a medical doctor. The Court believes that this Court, as well as other courts, in view of the thousands and perhaps millions of lives profoundly affected by such laws, can no longer avoid, but must now face this ultimate question, as well as the specific questions relating to this particular statute. The Court will do so now.

The Act provides, among others, that a woman may obtain an abortion if her pregnancy resulted from incest. Incest is a crime punishable by imprisonment in the State Penitentiary for from one to fifty years (Penal Code Section 285). In order to qualify for an abortion under this section

of the Act, a woman must admit that she has committed incest to her physician. In addition, pursuant to the statute, she must sign an affidavit that she has in fact committed incest, and naming the date the act occurred and the man with whom the act occurred. Further, the form in general use, pursuant to the Act, calls for "a true description of the events, complete with time, date and location."

The information submitted is required to be submitted to the District Attorney's Office. Of what possible use can this information be put to except for prosecution? Clearly none.

This Court will not hear the People claim that although it appears to be incriminatory on its face it in fact is not because they do not prosecute women for this offense. To do so would force the courts to declare the incest statute unconstitutional in that although apparently constitutional on its face, the practice of enforcement would be a clear violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution inasmuch as an arbitrary classification is made in practice; that is, men are treated differently than women. Both the man and the woman involved in an incestuous relationship must be treated equally.

The Court concludes, therefore, that this section violates the privilege against self-incrimination and is in violation of the Fifth Amendment of the United States Constitution.

In order for the defendant to assert as a defense this ground of unconstitutionality must it be shown that the alleged victims in these cases became pregnant as a result of incestuous relationships? Clearly not. To require the defendant to inquire at all would be to require the violation of the Fifth Amendment protection. Thus the entire statute must fall.

Even though it is not the defendant's Fifth Amendment privilege which is being violated, he is clearly a proper person to assert the privilege in this case, in accordance with

numerous recent decisions of the United States and California Supreme Courts.

The next question is whether the authority delegated by the Legislature to the Joint Commission of Accreditation of Hospitals and to the Committee of the Medical Staff of individual hospitals is a proper delegation of legislative authority. In order to be proper, definite and certain guidelines must be set forth so that the person exercising the authority knows exactly what the legislature intended, and so that the courts can review the exercise of authority.

In this statute there are virtually no established standards to limit the authority. What words of the statute there are which it might be argued set standards are so vague as to be completely meaningless. (This will be discussed further in considering the problem of vagueness.)

Improper delegation of legislative authority in the case of this statute leads to a far greater fault in the statute: The violation of the Equal Protection Clause of the Fourteenth Amendment.

The cases are now clear that in considering the Equal Protection Clause we look to the practice and effect of the statute not the mere face of the statute. What is the practice and effect here? It is that there is a distinct disparity of treatment and operation of the law in different geographic areas of the state. This can only be the result of improper delegation of legislative authority. We see that in an area which accounts for 16 per cent of the live births, 50 per cent of the abortions are performed, whereas in an area of the state which accounts for 50 per cent of the live births, 23 per cent of the abortions are performed. Such unequal treatment cannot be tolerated.

The Court finds also that there is a pronounced disparity of treatment between the rich and the poor, which is an improper, arbitrary classification, clearly violative of the Equal Protection Clause. The percentage of rejected applicants is far greater in "charity" or indigent hospitals than it is in private hospitals. The rich can "purchase", by consul-

tation fees, letters from the necessary psychiatrists to support their applications—the poor cannot. The result is that the rich can arrange for abortions under the present law almost at will. The poor cannot.

The Constitution of the United States does not, and the People of the United States will no longer countenance nor permit the unequal treatment of individuals based on their economic positions. All persons, regardless of their financial standing, must be treated equally, and any law not so treating them cannot stand. The time is past when this community—The United States—can or will tolerate arbitrary discrimination or unequal application of the laws.

The next issue I wish to consider is whether the statute is in any way vague or uncertain. A criminal statute must be definite and certain enough to apprise the public as to what acts are prohibited. Failing this, the statute is in violation of the Due Process Clause of the Fourteenth Amendment. For the most part, the statute is definite and certain. However, that part which refers to mental illness "to the extent that the woman is dangerous to herself or to the person or property of others or is in need of supervision or restraint," is completely without meaning and offers no guide whatsoever by which a person can determine what is permitted and what is prohibited. Does supervision mean in an institution, by a psychiatrist, at home? What does dangerous to herself mean? What does restraint mean? They have no meaning certain enough to apprise a person what conduct is prohibited. In addition the Court notes that these words are in the disjunctive, which compounds the vagueness.

This brings us to the primary underlying problem. Does a woman have a constitutional right to make a free choice whether or not to bear children, i.e., whether or not to have an abortion? The Constitution of the United States is strong and lasting because it was written, intentionally, in such a way as to guarantee certain basic freedoms yet to be able to expand and develop to meet changing times, attitudes

and approaches. The framers of the Constitution recognized that a constitution stiff and unbending could not long endure. They, therefore, framed, and Thomas Jefferson most clearly pointed out, a Constitution which would be able to develop to protect societies of which they could not dream. We are, therefore, faced with an area which might have been proper for legislation at the inception of the laws regulating abortions in 1850, but is no longer permissible in 1970, *People v. Belous, supra.*

Griswold v. Connecticut, 38 U.S. 479; states quite correctly that the People of the United States have certain non-enumerated fundamental rights. That among these are a right of privacy and a right to conduct interpersonal relationships between individuals in such a manner as the individuals choose.

This Court rules, that unless the State has a compelling state interest which permits it to interfere in this area; that the total freedom of choice as to whether or not to bear children, including the unrestricted right to have an abortion, is such a fundamental right, see also *People v. Belous, supra.*

At the inception of the old abortion law in 1850, the State had a compelling state interest in the preservation of the health of women involved. Abortion operations were dangerous with a high incidence of infection and death resulting. Due to the advance of medical science, this is no longer true. An abortion, properly done, is one of the safest operations with virtually no incidence of fatality. There is less danger to a woman from an abortion that from carrying the pregnancy to birth. Thus this state interest is no longer present.

It has been suggested that there is a state interest in preserving the morals of the state and controlling promiscuity. Besides the obvious fact that laws such as this have no effect whatsoever on sexual attitudes of the community, the Griswold case makes it clear that private sexual relations are beyond the purview of the state. The state has no compelling interest in controlling promiscuity.

The state no longer has, if it ever had, a compelling interest in increasing the population of the state. We need not consider this argument further, as the decision is abundantly clear.

The primary contention of compelling state interest advanced on this issue is that the law is necessary to preserve the life of the unborn. This argument will not stand the test of logic, however. When is there life present in the eyes of the law? Certainly not at conception. If there were life present at conception abortions would not be permitted in cases of rape or incest, or the other exceptions any more than it would be permitted to terminate the life of a one-year-old whose life had come as the result of rape or incest. We also see no suggestions that intrauterine devices or "morning after" pills, both of which are abortive devices, are illegal.

The case of *Keeler v. Amador County Superior Court*, 276 A.C.A. 324, considering the death of a 31- to 36-week fetus, states that the killing of a viable fetus—one capable of life out of the mother's womb—(which would always occur in the third trimester of a pregnancy) can be prosecuted for murder as the killing of a human being. Before this stage, the fetus is not considered a human being or alive.

In view of these and many other examples of the law treating the embryo different from a human, we cannot permit a legislative theory which decrees that life begins at conception. To do so would be to blandly adopt the philosophy of one of the country's major religions, an act which clearly would be in violation of the First Amendment to the United States Constitution.

Thus, the Court can find no compelling interest of the state, and concludes that the right to choose to bear or not to bear children is a fundamental right of the individual woman to be exercised in any manner she chooses and which may not in any way be abridged by law.

The Court concludes that the complaints fail to state a cause of action against the defendant inasmuch as the statute is violative of the United States Constitution.

The complaints are ordered dismissed and the defendant discharged.

Paul C. Mast
Presiding Judge

DATED: January 9, 1970